

United States
Court of Appeals
for the Ninth Circuit

MARION J. MURPHEY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY and ROBERT MARION MURPHEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Northern Division

FILED
MAY 25 1949

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	2
Answer to Complaint	7
Appeal:	
Certificate of Clerk to Transcript of Record on	78
Notice of	21
Statement of Points and Designation of Record on (USCA)	79
Certificate of Clerk to Transcript of Record on Appeal	78
Complaint, Amended	2
Designation of Record, Statement of Points and (USCA)	79
Findings of Fact and Conclusions of Law.....	15
Judgment after Trial by Court.....	20
Minutes of Court—Aug. 3, 1948—Order for Judgment	15
Names and Addresses of Attorneys.....	1

Notice of Appeal	21
Opinion and Order	8
Statement of Points and Designation of Record on Appeal (USCA)	79
Transcript of Proceedings	22

Witnesses:

Simon, Richard Francis (Deposition)

—direct 23

Brander, Paul W. (Deposition)

—direct 40

—cross 50

—redirect 71, 75

—recross 74, 77

NAMES AND ADDRESSES OF ATTORNEYS

FRANCIS E. HARRINGTON,

1124 Cascade Bldg.,
Portland 4, Oregon,

WILLIAM B. WETHERALL,

c/o Malone & Sullivan,

Mills Bldg.,
220 Bush St.,

San Francisco 4, California,

Attorneys for Plaintiffs.

EMMETT J. SEAWELL,

Assistant U. S. Attorney,
Northern District of California,
Sacramento 6, California,

Attorney for the Defendant. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the Northern District of California,
Northern Division

No. 5809

MARION J. MURPHEY, ELIZABETH IRENE
SWARTZ, MARJORIE JOSEPHINE PRES-
KEY, and ROBERT MARION MURPHEY,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

Plaintiffs complain and allege:

I.

Jurisdiction of this action is conferred upon the Court by the Act of August 2, 1946, Chapter 753, Title IV, Section 410, 6060 Stat. 843 (28 U.S.C.A. 931).

II.

Huldah Murphey died in Del Norte County, State of California, on the 13th day of July, 1945, leaving surviving her as her only heirs, the following named persons:

Marion J. Murphey, the surviving spouse of Huldah Murphey, deceased, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Elizabeth Irene Shwartz, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon. [3]

Marjorie Josephine Preskey, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Robert Marion Murphey, son of the said Huldah Murphey, who is of legal age, and is a resident of Eugene, Lynn County, Oregon.

At the time of her death, the said Huldah Murphey was of legal age, and was an adult over the age of 21 years.

III.

At all times herein mentioned there was and now is in full force and effect in the State of California, Section 377 of the Code of Civil Procedure of the State of California, which provides as follows:

“When the death of a person not being a minor or when the death of a minor person who leaves surviving him either a husband or wife or child or children is caused by the wrongful act of neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be judged.”

IV.

On July 12, 1945, at approximately 10:30 p.m., the said Huldah Murphey was proceeding as a pedestrian, with four other persons, to cross a bridge

in Del Norte County, California, in or near the city or town of Klamath, California, known as Jimmy Jack Bridge. Said bridge was a private bridge and way for the use of pedestrians, and was approximately ten feet wide overall and approximately 113 feet in length. Said bridge had no railings at the sides.

V.

While Huldah Murphey was crossing said bridge, and at the time when she was approximately one-half way between one end of the bridge and the other, she was forced off the bridge and fell to the ground below, a distance of approximately 14 feet 8 inches, by a motor vehicle of the United States Army which was then and there being operated by Paul Brander who was then and there a member of the Armed Forces of the United States acting in the line of duty. [4]

VI.

At and immediately prior to the time that said motor vehicle forced Huldah Murphey off the Bridge, the said Paul Brander drove and operated said motor vehicle in a careless and negligent manner in that:

(a) He negligently drove and operated said motor vehicle on a private way intended only for the use of pedestrians.

(b) He negligently failed to keep a proper or any lookout for pedestrians on the bridge, and particularly the plaintiff.

(c) He negligently drove and operated said motor vehicle upon and across said bridge at a high

and excessive rate of speed under the circumstances, to-wit, in excess of 15 miles per hour.

(d) He negligently drove said motor vehicle upon and across said bridge while it was occupied by pedestrians.

(e) He negligently drove said motor vehicle onto and across said bridge in disregard of the signal of a pedestrian to slow down or stop to avoid injury to the pedestrians on the bridge, although he either saw said signal or would have seen the same if he had been driving and operating the motor vehicle in the exercise of due care under the circumstances then and there existing.

(f) He negligently drove and operated said motor vehicle past the pedestrians on the bridge, including the plaintiff, without stopping and without slowing down sufficiently to avoid hazard and risk of injury to said pedestrians, including the plaintiff.

(g) He drove and operated said motor vehicle into and upon said bridge and toward and past the pedestrians thereon with the lights of said motor vehicle, which were very bright, turned on full and without dimming said lights so as to make it possible for the pedestrians on the bridge to step safely toward and to the edge thereof while said motor vehicle was passing them.

(h) He negligently operated said motor vehicle in such a direction, speed and manner as to cause it to force the said Hulda Murphey off of the bridge on which she was standing and causing her to fall a

distance of [5] approximately 14 feet 8 inches from said bridge to the ground below.

VII.

As the direct and proximate result of the negligence of the said Paul Brander as hereinbefore alleged, and the fall resulting therefrom, the said Huldah Murphey sustained personal injuries and severe shock, which resulted in her death on July 13, 1945.

VIII.

The heirs of the said Huldah Murphey, who are the plaintiffs herein, have suffered pecuniary loss from her death to the extent of \$30,000.00, to their damage in said sum.

IX.

The said Marion J. Murphey, as the surviving spouse of Huldah Murphey, suffered pecuniary damage from her death, in addition to the general damages herein before alleged, in that he was required to pay for funeral services and expenses for the said Huldah Murphey in the sum of \$490.00, to his damage in said sum.

Wherefore, the plaintiffs pray for judgment against the United States of America in the sum of \$30,000.00, and for the further sum of \$490.00, for a reasonable attorney's fee and for their costs and disbursements herein.

/s/ FRANCIS E. HARRINGTON,

/s/ WILLIAM B. WETHERALL,

Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 12, 1948. [6]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Now comes the defendant, United States of America, and answering the complaint of plaintiffs on file herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in Paragraphs I, and III of Plaintiffs' complaint.

II.

Answering the allegations set forth in Paragraphs II, IV, VI, VII, VIII, and IX of said complaint (and at all times denying negligence and/or carelessness), defendant alleges it has no information or belief concerning said allegations sufficient to enable it to answer the same, and for that reason and upon that ground it denies generally and specifically each and all of said allegations, and denies that plaintiffs have been damaged in the sum [7] of Ten Thousand, Four Hundred Ninety Dollars (\$10,490.00) and/or in any other sum, and/or at all.

III.

And as a further specific and distinct defense, and answering the allegations set forth in Paragraph V of said complaint, defendant alleges that at the time mentioned in said complaint, July 12, 1945, and at approximately 10:30 p.m. the driver of said government vehicle in question was not at said time acting within the scope of his office or employment but to the contrary was operating said government vehicle contrary to authorization and direction.

Wherefore, defendant prays that it may be hence dismissed with its costs of suit herein incurred, and for such other, further and different relief as may appear meet and proper in the premises.

FRANK J. HENNESSY,
United States Attorney,

By /s/ HARLAN M. THOMPSON,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 18, 1947. [8]

[Title of District Court and Cause.]

OPINION AND ORDER

This action is brought by the heirs at law of Huldah Murphey to recover the pecuniary loss sustained by them resulting from her death. Section 377 of the Code of Civil Procedure of the State of California gives a right of action to the heirs at law against the tortfeasor causing the death and against the employer responsible for his conduct.

Huldah Murphey was struck by a motor vehicle owned by defendant, United States of America, and driven at the time by Paul Brander, a member of the Army Air Corps of defendant. Brander was a staff sergeant stationed at a radar establishment with a complement of about twenty soldiers, located a short distance from the town of Klamath, California. A carry-all owned by defendant was customarily used by the men stationed at the post to convey them to the town of Klamath for their en-

tertainment when off duty. This was done under the authority of the commanding officer. Under this authority the vehicle was to be left parked to the side of a building in the town and remain there until the evening's entertainment was over, at which time it was used to re-convey the men to the post. Special permission was [9] required to use the vehicle for the pleasure of the men to go to any place other than Klamath. During the evening in question, Brander drove several men to the town, parked the vehicle as required and was walking around the town when he met another one of the men from the establishment, Sergeant Warneck. Warneck suggested that the two attend an "Indian Shaker ceremonial dance" which was in progress near-by. The two men got into the carry-all and started for the dance. After proceeding a short distance they met two of Warneck's women acquaintances. The ladies were accosted and they stated that they were on their way to the same dance. They accepted an invitation to get into the machine and the four proceeded on. The place where the dance was held was about six hundred to a thousand feet distant from the center of the town of Klamath. It was during the ride to that place that the fatal accident occurred.

There is no occasion to recount the evidence upon which the negligence of the driver of the government vehicle is predicated. I do not understand counsel for the government to seriously question that such negligence has been established. The court is satisfied that it abundantly appears from the evi-

dence that the death of Mrs. Murphey proximately resulted from the negligence of the driver, negligence which may be described as gross.

Plaintiffs proceed under two theories. The first theory is that the government is liable under the so-called "permissive use" statute of the State of California. And the second theory is under the rule of respondeat superior.

The first theory can be readily disposed of. The statute dealing with tort claims against the United States confers [10] exclusive jurisdiction upon the District Courts of the United States of claims against the United States for money damages on account of death caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant for such * * * death, in accordance with the law of the place where the act or omission occurred." The succeeding sentence reads, "Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages." There is no need to apply the rule that statutes waiving sovereign immunity are subject to strict construction. There is nothing in the quoted sentences which requires construction. These sentences are free from ambiguity. The second sentence

creates the right against the government, but the first sentence must be referred to in determining the meaning of the words "such claims, to the same claimants." The claims have reference to those inuring to the benefit of claimants who are injured through the negligence of an employee of the government while acting within the scope of his office or employment. This excludes any obligation on the part of the government for torts committed by its officers or employees occurring while the officer or employee is not acting within the scope of his employment. It follows that Section 402 of the California Vehicle Code, which creates a cause of [11] action against the owner of a motor vehicle for the negligence of one who is driving the same under his permission, without regard to whether at the time the driver was in the service of the owner, has no application.

The question next met is whether the United States at any time after the machine left the post was the employer, in the sense that the machine was being used in the business of the United States. It is established that the vehicle which ran into Mrs. Murphey was the property of defendant and that the driver was a soldier in the United States Army. In California proof of ownership gives rise to the inference that the driver was on the business of the owner, if the driver was at the time the employee of the owner. *Stewart v. Norsigian*, 64 Cal. App. 2d 540; *Heglin v. F.C.B.A. Market Inc.* 70 Cal. App. 2d 803. If evidence contrary to the inference is clear, positive, uncontradicted, and of such a nature that

it cannot rationally be disbelieved, the right to draw the inference disappears. *Blank v. Coffin*, 20 Cal. 2d 457. The question of the agency then becomes one of law. In the absence of evidence to that degree, there is presented a question of fact as to whether the inference shall or shall not be drawn.

The vehicle had been habitually used and was used that evening in conveying the military personnel from the military grounds to the town of Klamath. As stated, this was done under permission of the commanding officer, who had authority to give such permission. That the machine was being used to afford pleasure and amusement for the men does not necessarily negative agency. The amusement of the men may be a part of defendant's business. *Jacobus v. Brero*, 190 Cal. 375. Where the term "scope of employment" is involved [12] all relevant circumstances are to be considered and weighed in relation to one another. However, I do not find it necessary to come to a resolve upon this point since I am persuaded that, assuming but not deciding the use of the automobile while conveying the men to Klamath was within the scope of employment, there appears in the evidence proof that at the time of the accident the vehicle was not being so used. I come to this conclusion for two reasons. The first is that the use to which it was being put at the time of the accident was beyond the permitted use and contrary to the instructions of the officer in charge. Perhaps more importance should be attached to the second reason, namely, that at the time in question the vehicle was being used by the two

sergeants for their own personal ends. Where the purpose of the trip is confined to the driver's own personal business no liability attaches to the employer. *Hanchett v. Wiseley*, 107 Cal. App. 230; *Lane v. Bing*, 202 Cal. 577; *Kish v. California S. Automobile Assn.* 190 Cal. 248; *Walters v. West. Am. Ins. Co.*, 4 Cal. App. 2d 583; *Newman v. Steuernagel*, 132 Cal. App. 417. If the employer has entrusted his automobile to an employee for use by the employee in the employer's business the employer is not liable for the torts of the employee occurring while the employee is pursuing his own pleasure, and his activities are disassociated from the performance by him of any business of his employer. *Wober v. Allen Co.*, 64 Cal. App. 274; *Grisim v. Blumenthal & Co.*, 76 Cal. App. 712. This is true (absent a statute imputing to the owner the negligence of the driver—Section 402 California Vehicle Code) though the employee has the permission of the employer to use the latter's automobile in [13] the former's enjoyment. *Hall v. The Puente Oil Co.*, 47 Cal. App. 611.

Where the undisputed evidence positively shows that the employee was using the car for his own personal pleasure, without permission of the employer, and not performing any business of the employer, the right to draw the inference of agency is dispelled, *Bourne v. North. Counties Title Ins. Co.*, 4 Cal. App. 2d 69. Such is the situation in the instant case. The inference of agency is here overcome and there is as a matter of law no basis for its application.

Plaintiffs would draw to their aid the definition in the Tort Claims Act wherein it is stated "acting within the scope of his office or employment" when applied to a member of the military or naval forces of the United States means "acting in the line of duty." There is a clear distinction between "scope of employment" and "line of duty." *LaBella v. Southwestern Bell Telephone Co.*, 24 S.W. 2d 1072. But the act here comes within neither term. The cases recognize that something done by a soldier or sailor in the service of the United States in pursuance of a private avocation, or which is not a logical incident of provable effect of duty in the service is not done in the line of duty. *Collins v. Dollar S.S. Lines*, D.C.N.Y. 23 F. Supp. 395; *Hutchens v. Covert*, 78 N.E. 1061. The act to be one in the line of duty must have relation to causation, mediate or immediate, to the duty owed by the actor. *Rhodes v. United States*, 79 F. 740. Brander was not engaged in the performance of any duty to the United States at the time of the accident.

Judgment will be in favor of the defendant. Findings of fact will be submitted in conformity to the local rule.

Dated: August 3rd, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Aug. 3, 1948. [14]

MINUTES OF COURT

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of San Francisco, on Tuesday, the 3rd day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

This case having been heretofore tried and submitted, being now fully considered, it is, in accordance with an opinion and order this day signed and filed, Ordered that judgment be entered herein in favor of the defendant and against the plaintiffs, with costs, upon findings of fact and conclusions of law and judgment to be prepared by counsel for the defendant and submitted to the Court in conformity with the local rule. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on for trial on June 1, 1948, before the Court sitting without a jury, and the Court having heard the testimony and evidence introduced by deposition on behalf of the defendant and having examined the documentary proof offered by the parties, and the cause having been argued on June

1, 1948, and submitted by the parties, and the Court being fully advised in the premises, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That Huldah Murphey died in Del Norte County, State of California, on the 13th day of July, 1945, leaving surviving her as her only heirs at law the following named persons:

Marion J. Murphey, the surviving spouse of Huldah Murphey, deceased, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Elizabeth Irene Schwartz, daughter of the said Huldah [16] Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Marjorie Josephine Preskey, daughter of the said Huldah Murphey, who is of legal age, and is a resident of Portland, Multnomah County, Oregon.

Robert Marion Murphey, son of the said Huldah Murphey, who is of legal age, and is a resident of Eugene, Lynn County, Oregon.

2. That at all times herein mentioned there was and now is in full force and effect in the State of California, Section 377 of the Code of Civil Procedure of the State of California, which provides as follows:

“When the death of a person not being a minor or when the death of a minor person who leaves surviving him either a husband or wife or child or children is caused by the wrongful

act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be judged."

3. That on July 12, 1945, at approximately 10:30 p.m., the said Huldah Murphey was proceeding as a pedestrian, with four other persons, to cross a bridge in Del Norte County, California, in or near the city or town of Klamath, California, known as Jimmy Jack Bridge. Said bridge was a private bridge and way for the use of pedestrians, and was approximately ten feet wide overall and approximately 113 feet in length. Said bridge had no railings at the sides.

4. That while Huldah Murphey was crossing said bridge, and at the time when she was approximately one-half way between one end of the bridge and the other, she was forced off the bridge and fell to the ground below, a distance of approximately 14 feet 8 inches, by a motor vehicle owned by [17] the United States of America which was then and there being operated by Paul Brander. That the said Paul Brander was at said time a member of the Armed Forces of the United States, but was not acting in the line of duty and was not acting within the scope of his office or employment with the United States of America.

5. That the said Paul Brander at said time and place drove and operated said motor vehicle in a negligent manner and that said negligence consists of the particulars set forth in paragraph V of plaintiff's amended complaint.

6. That as a proximate result of the said negligence of the said Paul Brander the said Huldah Murphey sustained personal injuries which resulted in her death on July 13, 1945.

7. That prior to the date of the said accident the said motor vehicle had been customarily used by the members of the Army Air Corp for the purpose of transporting said members to the town of Klamath from the Army radar station located a few miles from the town of Klamath, and that such use of said motor vehicle by the said members of the said Army Air Corp was under the permission and authority of the commanding officer of such radar station and was used under such direction and authority for the sole purpose of transporting said members of such radar station when off duty from said station to the town of Klamath where the said members after being so transported had been in the custom of finding pleasure and amusement. The said members of the said Army Air Corp were authorized and directed to park the said vehicle to the side of a building in the said town where the said vehicle was required to remain until the evening's entertainment was over, at which time it was to be used to reconvey the men to the said radar station. Special permission was required to use the vehicle for the pleasure of the men to go to any [18] place other than Klamath, and that

neither the said Paul W. Brander, nor any other member of said Army Air Corp, was authorized to operate the motor vehicle for his or their personal uses, or for any other uses, than that hereinbefore set forth. That at the time in question the said Paul W. Brander was using said motor vehicle beyond the permitted use and contrary to the instructions and authority aforesaid and it was being used by the said Brander for his own personal use and business.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the court concludes that the plaintiffs are not entitled to a judgment against the defendant.

That at the time of said accident the said motor vehicle was not being operated by an employee of the defendant while acting within the scope of his office or employment.

The defendant is entitled to its costs and disbursements incurred herein. Let judgment be entered accordingly.

Dated: September 21st, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

2
1 [Endorsed]: Filed Sept. 21, 1948. [19]

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 5809

MARION J. MURPHEY, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT AFTER TRIAL BY COURT

This cause came on for trial on June 1, 1948, before the Court sitting without a jury, and the Court having heard the testimony and evidence introduced by deposition on behalf of the defendant and having examined the documentary proof offered by the parties, and the cause having been argued and submitted and the Court being fully advised in the premises and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid;

It is hereby Ordered, Adjudged and Decreed that the plaintiffs are not entitled to a judgment in their, or either of their favor and against the defendant, and it is further adjudged and decreed that judgment be entered herein in favor of the defendant against the plaintiffs for its costs of [20]

suit herein incurred in the sum of \$.

Dated: September 21st, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket Sept. 22, 1948. C. W. Calbreath, Clerk. By F. M. Lampert, Deputy Clerk.

[Endorsed]: Filed Sept. 21, 1948. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Marion J. Murphey, et al., plaintiffs herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that judgment entered against them and in favor of the United States of America on September 22, 1948.

/s/ FRANCIS E. HARRINGTON,

Of Counsel for Plaintiffs-
Appellants.

[Endorsed]: Filed Dec. 21, 1948. [22]

In the District Court of the United States for the
Northern District of California, Northern
Division

Before: Hon. Dal M. Lemmon, Judge.

Civil No. 5809

MARION J. MURPHEY, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT

June 1, 1948

Appearances: For the Plaintiffs: Francis E. Harrington, Esq., 520 S. W. 6th Avenue, Portland 4, Oregon, and William B. Wetherall, Esq., c/o Malone & Sullivan, Mills Tower Building, San Francisco, California. For the Defendant: Harlan M. Thompson, Esq., Ass't United States Attorney, Sacramento, California. [1*]

* * * *

Mr. Harrington: At this time, if the Court please, as a part of the plaintiff's case, the plaintiff would like to read into evidence two depositions taken by the defendant, on behalf of the defendant. The first deposition I will read is the deposition of Richard Francis Simon, taken on behalf of the defendant at 212 Federal Building, Toledo, Ohio, Tuesday, March 16th, 1948, at 10:00 o'clock.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Notice was given to me as counsel for the plaintiffs of [27] the taking of the deposition; and being unable to be present personally, or arrange for representation, I sent to the United States Attorney at Toledo, a series of interrogatories to be put to the witness. There is a stipulation between counsel that the signature of the witness to the deposition is waived and that the deposition may be read at the time of the trial, with the customary objections to the question.

The appearances were Mr. Marcus L. Friedman, Assistant United States Attorney, on behalf of the defendant; and no one appearing on behalf of the plaintiff.

(Reading.)

“Thereupon,

RICHARD FRANCIS SIMON,
being first duly sworn as provided by law, testified
as follows:

“Direct Examination

“By Mr. Friedman:

“Q. Will you please say your name?

“A. Richard Francis Simon.

“Q. Where do you live, Mr. Simon?

“A. Beaverdam, Ohio.

“Q. Calling your attention to the night of July 12, 1945, where were you then located?

“A. I was serving in the Army at the outskirts of the town of Klamath, California.

“Q. What was your occupation at that time?

(Deposition of Richard Francis Simon.)

“A. An officer in the United States Army.

“Q. When you say officer, what rank did you hold?

“A. A Lieutenant. First Lieutenant. [28]

“Q. Where were you stationed?

“A. Klamath, California.

“Q. In what capacity?

“A. As commanding officer of a radar establishment.

“Q. How long prior to July 12 were you stationed at Klamath, California, approximately?

“A. I'll say approximately one to two months.

“Q. And how long after July 12, 1945, were you stationed there?

“A. Approximately three months.

“Q. I would like to have you explain your duties as commanding officer of this radar station at Klamath, California.

“A. I was,—my primary duty was Administrative Officer for the records, and housing and feeding of the troops stationed there.

“Q. Were you an officer that assigned specific duties to any other Army personnel there?

“A. Yes.

“Q. And did you assign any such duties to one Sergeant Paul F. Brander? A. Yes.

“Q. What duties did you assign to him?

“A. His primary duty was maintenance man, to keep the radar in operation. [29]

“Q. What were his secondary duties?

“A. His secondary duties were non-com

(Deposition of Richard Francis Simon.)

missioned officer in charge of personnel when I wasn't around, and authorized driving a pass truck.

“Q. Now, I wish you would explain what you mean by ‘authorized driver of a pass truck?’

“A. An authorized driver of a pass truck is a man who was issued a license by the United States Government to operate one of their vehicles in any capacity, which means he could move troops, operate a truck for pleasure or for supplies.

“Q. When you say he could use a truck for pleasure, do you mean under your instructions, or at his own will? A. Under instructions.

“Q. That is, under instructions of the commanding officer? A. Yes.

Mr. Thompson: Pardon me one moment on that question. Going back down “under your instructions.” Did you read “your”? I wasn't certain.

Mr. Harrington: I believe I did.

The Court: Well, that is all right. If you didn't, you can correct it.

Mr. Harrington (Reading): [30]

“Q. On the night of July 12, 1945, did Sergeant Brander have such authority to drive a pass truck into the town of Klamath? A. Yes.

“Q. What time did he leave the Camp for Klamath, if you know? A. Unknown.

“Q. Can you give us the approximate time?

“A. Approximately 6:30 or 7:00 o'clock in the evening, which was usually the regular time they went in.

(Deposition of Richard Francis Simon.)

“Q. What was the purpose of his driving that pass truck into Klamath that night?

“A. His purpose was to transport the rest of the boys stationed there into the town for entertainment, movies, etc.

“Q. Do you know how many passengers he carried that evening? A. I don't know.

“Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

“A. Will you repeat that?

Then, Mr. Friedman said:

“Will you read that back, please?” [31]

—addressing the Notary, and the question referred to was read by the Notary as follows:

“Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

“A. No, he had no authority.”

If the Court please, I would move at this time that that question and answer be stricken as a conclusion of the witness as to whether the driver had authority. I believe the facts are to be presented rather than the conclusion of the witness.

The Court: Oh, strictly speaking, that is true; yes.

Mr. Thompson: I object, your Honor, to striking it.

The Court: It was told him.

(Deposition of Richard Francis Simon.)

Mr. Harrington: He might say what his instructions were, what he had been told to do.

The Court: What he had been told to do and what he had been doing—a chance to prove to his superiors. All right, proceed.

Mr. Harrington (Reading):

“Q. Was Sergeant Brander to remain with the truck at all times during that evening while in Klamath?

“A. No; he was free to seek his own entertainment, and then to drive the boys back to the camp in the evening about 10:00 to 11:00 o'clock.

“Q. When you say he was ‘free to seek his own entertainment,’ was he also free to use that pass truck during that evening? A. No.”

I move at this time that that question and answer be stricken.

The Court: Well, if you are referring to these objections, I would suggest that you take another deposition and get the facts. If you are going to stand on the objections that these are conclusions, I would want these statements and what the facts were, at least, so that I could draw the conclusion.

Mr. Harrington: If the Court please, I think the deposition as read will clearly disclose the facts; and the deposition was taken by the defendant, and I am reading into the record the defendant's questions in the defendant's deposition.

The Court: Well, that is very well; but if the objections are made and they are good, I sustain them; and the perfect testimony isn't before the

(Deposition of Richard Francis Simon.)

Court, and I want it to be here in some satisfactory and appropriate manner.

Mr. Harrington: Then——

The Court: It is stricken.

Mr. Harrington: If the Court please, I do want to avoid the necessity of taking another deposition.

The Court: Well, I am in a peculiar position in these tort cases; and although the United States Government has consented to be sued, I do feel that the Judge on the bench should [33] have presented to him all available facts.

Mr. Thompson: May it please the Court, in regard to the last motion on the part of the plaintiff—“When you say he was ‘free to seek his own entertainment,’ was he also free to use that pass truck during that evening?”—the answer is “No.” Well, the questions are being directed to his superior officer, and certainly his superior——

The Court: Nevertheless it is a conclusion.

Mr. Thompson: In that sense, it might be deemed a conclusion.

The Court: Recess.

(A recess was taken.)

The Court: Proceed.

Mr. Harrington: If the Court please, counsel will make no further objection to the questions as conclusions of the witness, but will reserve his remarks concerning them to the time of argument as to the strength.

The Court: That means also that you waive

(Deposition of Richard Francis Simon.)

those objections that you have heretofore made?

Mr. Harrington: Yes, your Honor.

The Court: Very well.

Mr. Harrington: If the Court please, I will omit the term "Question" and "Answer," and let my inflection govern it.

The Court: Very well. [34]

Mr. Harrington (Reading):

"Q. What was supposed to happen to the truck while they were seeking entertainment?

"A. Parked alongside a building in town, and left there until it was ready to come back.

"Q. Is that how far his authority went for the use of the pass truck? A. Yes.

"Q. Did you know any of the names of any other occupants of the pass truck that drove into Klamath with Sergeant Brander that evening?

"A. Well, I know one, that was Sergeant Lowell Warnik.

"Q. In your capacity of commanding officer, did you question Sergeant Brander and Sergeant Warnik in reference to the death of Mrs. Murphey?

"A. Sergeant Brander, I questioned him.

"Q. You questioned Sergeant Brander; during this questioning did he inform you whether the truck was used for any other purpose than originally designated by his authority?

"A. Well, yes; he used the truck to go to a shaker meeting.

(Deposition of Richard Francis Simon.)

“Q. Now, what do you mean by a ‘shaker meeting’?”

“A. That is the term they use in Klamath, California, for the meeting of the Indians; they call it a [35] shaker meeting.

“Q. And how far was this meeting from Klamath, California, in miles?

“A. It is in blocks, about two or three blocks.

“Q. About two or three blocks; that would be from the city of Klamath?

“A. I’ll say about five blocks.

“Q. Did Sergeant Brander drive the vehicle to that meeting?

“A. Why, yes; he started to, but he never got there.

“Q. Who accompanied him on the drive to the shaker meeting?

“A. Why, Sergeant Lowell Warnik and two women.

“Q. In questioning Sergeant Brander, did he tell you what caused him to drive to the meeting contrary to orders?

“A. Why, yes; he told me that Sergeant Warnik had suggested the use of the truck to go to the Shaker meeting.

“Q. Now, within your knowledge, did Sergeant Brander and Sergeant Warnik know that the truck should not have been used for that purpose?

“A. Yes.

“Q. Do you know, or were you told by Sergeant

(Deposition of Richard Francis Simon.)

Brander about what time they started for this shaker meeting? [36] A. I can't recall.

“Q. In the questioning of Sergeant Brander did he inform you how the accident occurred?

“A. Yes.

“Q. Will you explain to us how that accident occurred?

“A. Sergeant Brander told me that he had started to go to the shaker meeting, and to reach the shaker meeting it was necessary to go across the bridge which had no guard rails, and at the time he approached the bridge the shaker meeting was over, and the people attending the meeting had started to cross the bridge on foot at the other end, and as he drove over the bridge about half way or a little more than half way across, he heard people,—a commotion, people telling him to stop, so he stopped as soon as his wheels were off the bridge, and he went back to investigate and found that a person had fallen off the side of the bridge.

“Q. Did he inform you whether he struck this person, the motor vehicle struck this person; or how did it occur?

“A. He was positive he did not strike anyone. He told me the motor vehicle did not strike that person.

“Q. How soon after the accident occurred were you informed as commanding officer of the station?

“A. I'll estimate 10 minutes, 10 minutes to the time I got there.

(Deposition of Richard Francis Simon.)

“Q. In other words, you were immediately notified and left for the scene of the accident?

“A. Yes.

“Q. When you arrived did you talk to any of the persons that viewed this accident; and possible witnesses? A. Yes.

“Q. Do you know the names of the persons whom you interviewed? A. No.

“Q. Did they make a statement giving you an explanation of how it occurred, if you recall?

“A. I don't recall clear enough.

“Q. Was there an inquest conducted at the death of this woman, Mrs. Murphey?

“A. Yes, sir; there was a Coroner's inquest in Klamath, California.

“Q. And did you attend that inquest?

“A. Yes, sir.

“Q. Did you question any person or persons at the inquest?

“A. I questioned the daughter or daughter-in-law of the deceased during the Coroner's inquest.

“Q. What questions did you propound to her?

“A. I asked her on which side of her mother or mother-in-law she was walking towards the Army vehicle.

“Q. Any other questions?

“A. And I asked her, ‘Did the Army vehicle strike her’?

“Q. Do you recall her answer?

“A. To the first question she answered to the mother-in-law's, or mother's left; to the second question she answered, “No.”

(Deposition of Richard Francis Simon.)

“Q. You asked no other questions?

“A. No other questions.

“Q. Do you know what the Coroner’s finding was?

“A. Accidental death due to blinding lights of an Army vehicle.

“Q. After making your report did you turn in your report to your commanding officer?

“A. Yes; a copy of the Coroner’s inquest was also sent.

“Q. Now, Mr. Simon, did you at any time either prior to July 12, on July 12, or after July 12, 1945, give any authority to Sergeant Brander or any other Army personnel to operate this or any other Government vehicle except in the course of operation in connection with their duties for the United States Government? [39] A. No.

“Mr. Friedman: That’s all on that. Now for the record there was submitted to me, as the United States Attorney, interrogatories by Francis E. Harrington, Attorney-at-law, Cascade Building, Portland, Oregon, requesting that I, as Assistant United States Attorney conducting this deposition, read to Mr. Simon the interrogatories and to obtain a direct answer to each in order.

“This is a letter addressed to me on March 12, 1948, and received on March 15, 1948, and on behalf of Mr. Harrington I will now put the interrogatories to Mr. Simon.

“Q. Mr. Simon, I have here a group of interrogatories which are to be answered by you at the

(Deposition of Richard Francis Simon.)

request of Mr. Francis E. Harrington. The first is: 'If any part of the following statement is untrue, state the particular respects in which it is untrue. That your name is Richard F. Simon?'

"A. That's right.

"Q. 'You are a resident of Beaverdam, Ohio?'

"A. True.

"Q. 'You were on July 12, 1945, a Lieutenant in the Air Corps of the United States Army assigned to radar work?' [40]

"A. True.

"Q. 'On July 12, 1945, you were the commanding officer of a radar warning station operated by the United States Army at or in the vicinity of Klamath, California?' A. True.

"Q. 'That Paul F. Brander was on July 12, 1945, an enlisted man assigned to the said radar station and that he was subject to your command?'

"A. True.

"Q. 'That Lowell Warnik was a Sergeant in the Air Corps, United States Army, and assigned to the said radar station under your command on July 12, 1945?' A. True.

"Q. 'That on July 14, 1945, you attended an inquest into the death of one Huldah Murphey before Frank J. Blackerby, Coroner, at Klamath, Del Norte County, California, in your capacity as commanding officer of the radar warning station?'

"A. True.

"Q. 'That you questioned several of the witnesses who gave testimony at the inquest?'

(Deposition of Richard Francis Simon.)

“A. I just questioned one.

“Q. You merely questioned one witness, is that correct? A. Yes.

“Q. ‘That Sergeant Lowell Warnik was present at the [41] inquest but did not testify?’

“A. True.

“Q. ‘That Paul F. Brander testified at the inquest, that he was the driver of the Army carry-all, No. 2053411, which was involved in the accident resulting in the death of Huldah Murphey?’

“A. He was the driver, but I don’t recall the Army Truck number.

“Q. He was the driver of an Army carry-all, the number of which you do not remember, is that correct? A. That’s right.

“Q. ‘That the Army carry-all above-mentioned was assigned to and a part of the motor vehicle equipment of the radar station of which you were the commanding officer?’ A. True.

“Q. ‘That you are not now, and have not been since February 1, 1948, an officer or employee of the United States Government in any capacity whatsoever?’ A. No.

“Q. That is true? A. True.

“Q. Interrogatory No. 2: ‘Describe in detail the number of vehicles, giving type, size and carrying capacity assigned by the United States Army to official service at the radar station at Klamath, and which were or could be used to transport personnel on the public roads of California for five days before and after July 12, 1945.’

(Deposition of Richard Francis Simon.)

“A. I can’t recall the number, type, size and make of Army vehicles we had assigned to us, but I do remember they were used for transporting troops.

“Q. Interrogatory No. 3: ‘Describe the location of the radar station, giving the distance from the personnel quarters or barracks to—(a) the boundaries of the station.’

“A. I don’t feel as though I can answer that question.

“Q. Why?

“A. That is a matter of giving away information on radar sighting that was supposedly confidential.

“Q. Were you instructed that that was confidential while you were in the United States Army? A. Yes.

“Q. And at this time you do not care to disclose same without proper authority from the Army? A. From the Army, yes.

“Q. (3, cont’d): ‘The nearest public road.’

“A. U. S. Route 101.

“Q. (c): ‘The nearest major public highway.’

“A. Same.

“Q. (d): ‘The nearest boundary of the nearest town, village or settlement and the name of such place.’

“A. Three miles, the town of Klamath, California.

“Q. (e): ‘The center of such town, village or settlement.’

(Deposition of Richard Francis Simon.)

“A. Three miles and two blocks.

“Q. (f): ‘The nearest boundary or outskirts of the town of Klamath;’ that would be giving the distance from the personnel quarters to the nearest boundary of the outskirts of the town of Klamath?

“A. That would be three miles.

“Q. (g): ‘The center of the town of Klamath.’

“A. That would be three miles, and two or three blocks.

“Q. (h): ‘The tavern or restaurant in Klamath known as the “White Spot”.’

“A. I don’t recall any ‘White Spot,’ but there was a ‘Bright Spot,’ which was three miles and one block.

“Q. Interrogatory No. 4: ‘State whether a usual and customary duty assignment of Paul F. Brander during the month of June, 1945, and up to and including the 12th of July, 1945, was the driving of Army motor vehicles.

“A. His primary duty was the maintenance of radar [44] equipment, and he was also N.C.O. in charge of the camp in my absence, and an authorized driver of Army vehicles.”

At this point, I ask the Court to take note of the fact that “N.C.O.” means “Non-commissioned Officer.”

(Continuing reading.)

“Q. Interrogatory No. 5: ‘State whether, when the personnel of the radar station visited in Klamath in the evening, public carrier transportation

(Deposition of Richard Francis Simon.)

was available, and if so, describe its frequency of service and the distances which had to be traversed on foot to make connections.'

"A. There was no public conveyance available.

"Q. Interrogatory No. 6: 'State the number and complement of the personnel at the radar station on July 12, 1945.'

"A. Unknown; but approximately 20.

"Q. Interrogatory No. 7: 'State how many of the personnel of the station were transported to Klamath by Paul Brander in the Army Carry-all on the night of July 12, 1945.'

"A. Unknown.

"Q. Interrogatory No. 8: 'State the number of times each U. S. Army personnel-carrying motor vehicle of the station was in the town of Klamath after 6:00 p.m. [45] during the month of June, 1945, and up to July 12, 1945.'

"A. Exactly, unknown. Estimated, once per night.

"Q. Interrogatory No. 9: 'State how many times the Army carry-all mentioned in question 1 was in the town of Klamath after 6:00 p.m. between June 1 and July 12, 1945.'

"A. Once per evening.

"Q. Interrogatory No. 10: 'State whether you or any other person took disciplinary action against

'(Deposition of Richard Francis Simon.)

Paul Brander on the ground and for the reason that he removed the Army carry-all from the limits of the radar station on July 12, 1945, in violation of any post or Army rule, regulation or order. If your answer is in the affirmative, give the exact wording of the charge against Brander, and the disposition of the charge or action.'

"A. I didn't take any action against Brander.

"Q. No action was taken against Mr. Brander for removing the Army vehicle from the Army station that evening the accident occurred?

"A. Higher authorities took action against him.

"Q. What action did you take?

"A. I took none.

"Mr. Friedman: That's all." [46]

Mr. Harrington: There follows the certificate of Herbert N. Archambault, a Notary Public, with respect to the taking of the deposition. It is the customary form.

The second deposition I will read into the record is the deposition of Paul W. Brander, taken on behalf of the defendant, before Simon A. Lubow, a Notary Public, of the State of New York, taken on April 5, 1948, at 4:00 o'clock, pursuant to notice and agreement.

The appearances were: Frank A. Crimi, of 50 Church Street, New York, of counsel for the plaintiff; and Nathan Skolnik, Assistant United States Attorney for the Southern District of New York, as attorney for the defendant.

(Reading.)

“PAUL W. BRANDER,

“a witness called on behalf of the defendant, being first duly sworn by the Notary Public, deposes and says as follows:

“Direct Examination

“By Mr. Skolnik:

“Q. Will you please state your full name and address?

“A. Paul William Brander, 2454 Webb Avenue, Bronx 63, New York.

“Q. On July 12, 1945, were you in the service?

“A. Yes.

“Q. What branch of the service were you in?

“A. The Army Air Corps.

“Q. What was your rank and where were you stationed [47] at that time?

“A. I was a staff sergeant and I was stationed about a mile and a half or two miles south of the town of Klamath.

“Q. Please tell us the number of your battalion or squadron or division, and the type of such division or squadron?

“A. It was the 411 Army Air Forces Bases Unit, also known as the San Francisco Control Group. I was in Company B.

“Q. And you were stationed near or at Klamath, California? A. That is correct.

“Q. How long had you been stationed at this particular base? A. About four months.

“Q. Prior to the accident? A. Yes.

“Q. Will you please tell me what your duties

(Deposition of Paul W. Brander.)

consisted of while you were at that particular base?

“A. I was the radar maintenance chief.

“Q. What was that?

“A. I was the radar maintenance chief.

“Q. Was the driving of an Army vehicle included among your duties? [48]

“A. No; because of the shorthandedness we had a few men there and everybody took turns driving a pass truck into town.”

I made a mistake in the reading. I would like to repeat the question and answer.

“Q. Was the driving of an Army vehicle included among your duties?

“A. No; because of the shorthandedness we only had a few men there, and everybody took turns driving a pass truck into town.

“Q. Was that for official purposes or also for private use?

“A. That was private use to get into town for recreation. We had no other means of getting into town.

“Q. But such driving of the truck was not used for official purposes, is that correct?

“The Witness: Excuse me?

“Mr. Skolnik: Repeat the question, please.

“Q. (Read.)

“A. Well, what do you mean by official purposes? You mean picking up rations in town or things of that nature?

“Q. For purposes of the Army, for official pur-

(Deposition of Paul W. Brander.)

poses as distinguished from leave purposes or private use.

“A. Well, that was leave purposes. [49]

“Q. Therefore I again ask you, was driving of this truck included among your official duties and purposes while you were stationed at Klamath?

“A. Only when I had to go to town to pick up rations; occasionally when there was no one else available to take the truck into town I drove it in.

“Q. When those occasions arose was it during the daytime or the evening?

“A. Those were only during the daylight hours.

“Q. Were there any orders outstanding prior to the date of the accident regarding the use of any Army vehicles during evening hours?

“A. No.

“Q. If you wanted to use an Army vehicle to go into town during your leave hours could you do so without asking anyone's permission or were you required to ask the permission of some officer?

“A. The truck went in each evening after the evening meal, and there was no permission asked, and usually the boy who got to the truck first drove it in.

“Does that answer your question?

“Q. Yes. Now, on the night of July 12, 1945, do you recall who had taken the truck from camp to go to town? A. Yes. [50]

“Q. Who was it? A. I did.

“Q. Did you ask for permission on that par-

(Deposition of Paul W. Brander.)

ticular evening? A. No.

“Q. Did you take any other soldiers with you to town that evening? A. Yes.

“Q. How many men did you take with you?

“A. I believe there were about four of us.

“Q. About what time did you leave the camp?

“A. About nine o'clock.

“Q. 9:00 p.m.? A. Yes.

“Q. What kind of vehicle did you take to go to town?

“A. It was a half-ton vehicle known as a carry-all, somewhat similar to a station wagon.

“Q. And where were you headed for when you left camp? A. To Klamath.

“Q. Were you on leave at that particular time?

“A. Yes, I was off duty.

“Q. What was the purpose of your visit to Klamath? A. Recretation.

“Q. Will you please tell me what happened after you [51] left camp to go to Klamath?

“A. We got into town, parked the truck, and I walked around and then one sergeant came up to me, Sergeant Lowell Warneck, and asked me if I would drive him over to the Indian Shaker ceremonial dance. I agreed.

“Q. By the way, where was this?

“A. In Klamath. Then Sergeant Warneck got in the truck; we proceeded a short distance, and he saw two women that he had known, and he asked if I would not give them a lift as they were going over to the same place. They got on board and we

(Deposition of Paul W. Brander.)

proceeded. I asked Sergeant Warneck where this ceremonial dance was, and we had gotten a short distance along the highway when he told me to make a left turn, which I did. This road ended—that is, the public street ended at a farm——

“Q. At a farm you say?

“A. Yes, and we entered a small dirt road going to the farm, and as I made a short left turn I came upon a wooden bridge with some people coming towards me from the opposite direction.

“Mr. Crimi: People were coming towards you on the bridge?

“The Witness: Well, they were just starting to enter upon the bridge. [52]

“I proceeded to cross the bridge and kept to my right and passed the bridge and stopped about 50 yards beyond the end of the bridge, as I had come to a barn at which the Indian ceremonial dance was taking place.

“Q. What happened then?

“A. I stopped the vehicle and got out. A young woman came up to me and said that a woman had fallen off the bridge, that being my first indication of anything happening.

“Q. What did you do, if anything?

“A. I stood there stunned for a while, and then I walked down alongside the bridge down to the bottom to see what had happened. This elderly woman was lying on her back, and then I noticed one of our sergeants, Sergeant Eugene Wike, was there, and I requested that he go up and put another

(Deposition of Paul W. Brander.)

call in for the ambulance, and also to get the lieutenant who was in charge of our radar station.

“Q. And did an ambulance subsequently come?

“A. Not for several hours.

“Q. Was any doctor called at the time?

“A. There was no doctor available.

“Q. What was done for the woman, if anything?

“A. She was made comfortable by some of the neighbors [53] there by placing blankets under her as best they could.

“Q. Now coming back to the point where you mentioned you were approaching this bridge, will you please describe the type of bridge it was? Please describe the bridge, how long was it, how wide was it, and any other detail that you can recall about the bridge.

“A. I believe the bridge was was some 30 feet long with a width of about 11 foot——

“Mr. Crimi: Did you say 30 feet long? Did I get that right?

“The Witness: 30.

“A. (Continuing): ——with no railing.

“Q. Was it a wooden bridge or concrete?

“A. It was wooden.

“Q. As you approached this bridge do you know whether you had your headlights on?

“A. Yes.

“Q. How do you know?

“A. I had to; I couldn't see where to drive without them.

(Deposition of Paul W. Brander.)

“Q. Were you able to see the bridge well before entering upon the bridge?

“A. Not until I was within some 30 feet from it.

“Q. And when you reached this point of about 30 feet [54] from the bridge, did the light from your headlights give you sufficient lighting to see the bridge and to pass over it? A. Yes.

“Q. Where were you with relation to the entrance to the bridge, or how far away were you with relation to the entrance to the bridge when you first noticed these people coming towards you?

“A. I would say about 25 feet in front of me before I actually got upon the bridge.

“Q. How fast were you proceeding? How fast were you traveling at that particular point?

“A. About seven miles an hour.

“Q. How fast were you traveling when you got onto the bridge?

“A. I slowed down somewhat but I couldn't say the exact figure.

“Q. About what rate of speed were you traveling then?

“A. I would say I was going about a mile or a mile and a half less.

“Q. About what?

“A. About 5½ to 6 miles an hour.

“Q. And about what rate of speed were you actually crossing the bridge?

“A. About the same; about 6. [55]

“Q. Now, where were these people coming towards you when you first saw them? Were they

(Deposition of Paul W. Brander.)

on the bridge or were they approaching the entrance of the bridge?

“A. They were just about on the bridge.

“Q. How many people were there?

“A. Well, there were three in a group.

“Q. How were they walking, as a group, abreast of each other, or in what way?

“A. Well, they were walking along as a group. That is to say, one was leading, and they were quite close together, and as they came toward me they singled out into single file.

“Q. Where were they in relation to the bridge when they singled out, when they divided into single file?

“A. They were on the bridge, the beginning of the bridge.

“Q. What was that?

“A. The beginning of the bridge.

“Q. About how many feet had they walked on the bridge when they got into single file?

“A. They may have walked about three at the most, I think.

“Q. Three what?

“A. Three feet on the bridge.

“Q. Now will you please describe in detail exactly [56] what portion of the bridge your automobile passed over? In other words, were you passing over the center portion of the bridge to the right, the right portion of the bridge, or the left portion of the bridge?

“A. As I came upon the bridge I kept to my

(Deposition of Paul W. Brander.)

right at least—oh, within about six inches from the righthand side; that is, as I came on there I was slightly over to the right and as I saw these people coming I went over further and as I passed them I was six inches from the righthand side.

“Q. You mean the distance between the right end of your right side of your truck was approximately six inches from the right end of the bridge?

“A. That is right.

“Q. About how wide was your truck, do you know?

“A. I believe the truck measured something like 6 feet 2 inches in width.

“Q. In other words, you would say there was over 4 feet to your left? A. I believe so.

“Q. And did you continue moving along that path until you crossed the bridge?

“A. Yes, I did.

“Q. While crossing the bridge did you hear any sounds or outcries or noises of any kind from these people who were crossing the bridge in the opposite direction? A. No, I did not.

“Q. When for the first time did you know that a person had fallen off the bridge?

“A. When I stopped 50 yards beyond the bridge and this woman came up and told me so.

“Q. Do you know whether or not your truck struck this woman who fell off the bridge?

“A. I am sure the truck did not strike her.

“Q. Did you make a statement to any Army of-

(Deposition of Paul W. Brander.)

ficial for the Government regarding the said accident?

“A. Yes, the lieutenant took a statement from me.

“Q. What was his name?

“A. Lieutenant Richard Simon.

“Q. And did the statement that you gave to Lieutenant Simon contain substantially the same facts as you are now giving us at this deposition?

“A. Yes, sir.

“Q. Your trip to this Indian Shaker ceremony was in no way connected with your official Army business, is that correct?

“A. That is correct.

“Q. This visit was strictly a personal matter, a [58] pleasure trip on your behalf, is that correct?

“A. Yes.

“Q. Approximately what time did this accident occur? A. About 10 o'clock. 10 p.m.

“Q. Under existing Army regulations were you bound to return to the camp at any particular time?

“A. Yes, at midnight.

“Q. Do you know the names of the people who accompanied the woman who fell off the bridge at the time of the accident?

“A. I don't remember their names but I know one was a daughter and the other I heard was a son-in-law.

“Q. Will you please tell me in what order these people were passing the bridge; that is, who came first, who was second, and so forth?

[(Deposition of Paul W. Brander.)

“A. I didn’t take particular notice of who came first but I believe the two women were preceding the man who was following them.

“Q. Do you know who was walking first?

“A. No, I did not observe them that closely.

“Q. In other words, you don’t know whether the deceased was walking first in line or whether it was the other woman who was walking first in line? A. No, I don’t. I can’t say.

“Q. Do you know how far apart these people were walking [59] while they were on the bridge, while they were passing the bridge?

“A. They were about two feet apart.

“Q. In other words, each person was two feet back of the other? A. That is correct.”

Mr. Skolnik at this point said:

“No further questions.

“Cross-Examination

“By Mr. Crimi:

“Q. Now, Mr. Brander, you say that on this particular night of June 12, 1945, you left the camp at about 9:00 p.m.?

“A. That is correct.

“Q. And went into Klamath, California, is that right? A. That is right.

“Q. And you say that four people were on the truck. Could you give us the names of the four people with you during the ride to Klamath?

“A. Sergeant Wike was one, and myself, and I don’t remember who the two others were.

(Deposition of Paul W. Brander.)

“Q. Was Sergeant Lowell Warneck one of the four? A. No.

“Q. In other words, you met Sergeant Warneck in Klamath?

“A. Yes; he had gone to town earlier. [60]

“Q. Now, you say there were no rules and regulations concerning the motor transportation from the camp to any nearby town, Klamath, or any other town?

“A. That was the only place we went to, was Klamath. However, if there was an occasional dance at any other town, we generally asked the lieutenant whether we could go.

“Q. You would then ask the lieutenant whether you could go?

“A. Yes. There would be mileage involved there.

“Q. Would you ask the lieutenant whether or not you could take a motor vehicle from the pool or otherwise, say a motor vehicle from the camp to the particular town?

“A. Are you referring to Klamath now?”

There was a discussion off the record.

“Q. Could you tell us whether or not at the time that you obtained permission from your superior officer to attend a dance at any other town, whether at the time you would also require permission as to the motor vehicle that you would use to get to that town from the camp?

“Mr. Skolnik: If you don't understand the question it can be read to you.

“The Witness: I understand the question, but

[(Deposition of Paul W. Brander.)]

I [61] don't know just how to answer it, because there were several other points that come in there."

There was a discussion off the record and the question was then read.

"Mr. Crimi: Please read the question."

The question was read.

"A. We always asked the lieutenant's permission to go to any town outside of Klamath.

"Q. But you did not have to ask permission as to the motor vehicle that you could use or would use for that particular occasion, did you?

"A. Well, that was the point I was just stressing.

"Q. Well, we want an answer on the record.

"A. No.

"Q. Now, Mr. Brander, you recall testifying at the inquest of the deceased woman, Huldah Murphey? A. I do.

"Q. And you recall testifying at the time in answer to a question saying that you had been requested to drive Sergeant Warneck over to the Shaker meeting, is that correct?

"A. That is correct.

"Q. Now who made that request?

"A. Sergeant Warneck.

"Q. Did you consider that an order at the time?

"A. No.

"Q. You did not? A. No.

"Q. Could you have refused Sergeant Warneck's request? A. Yes.

(Deposition of Paul W. Brander.)

“Q. Now you stated, Mr. Brander, that the bridge was 30 feet long; am I correct in that?

“A. I believe it was.

“Q. Did you hear the testimony of the highway policeman at the inquest? A. Yes, I did.

“Q. Do you recall whether or not the highway policeman was asked measurements as to the length of the bridge, the width, etc.?

“A. I don't remember. I believe he was asked the measurements of them, but what he stated them to be, I don't remember.

“Q. But you do recall that he testified that he had taken some measurements, is that right?

“A. That is correct.

“Q. If I were to state that the highway patrolman testified that the bridge was 113 feet long, would that in any way refresh your recollection, Mr. Brander?

“A. I may have understated the distance, but it is [63] hard for me to picture how long the bridge was now with all the time that has elapsed.

“Q. How wide would you say that this room was, according to your estimate?

“A. I would say it was about 15 feet.

“Mr. Crimi: Can we concede that?”

There was a discussion off the record.

“Mr. Skolnik: We will concede it is about 15 feet.

“Mr. Crimi: All right.

“Q. Would you say now, Mr. Brander, that the

(Deposition of Paul W. Brander.)

bridge, according to your estimation, was twice the length of this room? A. No.

“Q. Shorter or longer or what, can you tell us?

“A. It would be longer.

“Q. Would you say then that the figure of about 113 feet is more or less representative of the actual length of the bridge? A. Yes.

“Q. And as to the width, you said it was 11 feet? A. Yes.

“Q. If I were to state that the officer, the highway officer testified that the bridge upon measurement was actually 10 feet, would that be about right? A. Yes.

“Q. Now, Mr. Brander, about this bridge—was there something on the bridge to guide vehicles going across? Can you try to think back? Was there something on the bridge guiding vehicles going across?

“A. I believe there might have been planking on there.

“Q. Planking? A. Yes.

“Q. Could you tell us, more or less, how wide or how far apart these plankings were to the best of your memory?

“A. About the width of a normal tread of a car.

“Q. In feet how much would that be about?

“A. I would estimate it as being about 5½ feet.

“Q. 5½ feet apart?

“A. From center to center.

“Q. From center to center? A. Yes.

“Q. If I were to state that the California high-

(Deposition of Paul W. Brander.)

way patrolman said that this planking was 18 inches from each edge, would that be about correct, 18 inches from each edge of the bridge?

“A. It could be.

“Q. So that in driving across this bridge, Mr. Brander, you would have to keep within this planking, is that [65] right; you could not drive out of it; the planking would keep you according to the way it was laid out in the middle of the bridge?

“A. No.

“Q. It would not? A. It would not.

“Q. Well, if you got to the right side of the bridge, as you testified, you would have to jump the planking, is that right? A. That is right.

“Q. Did you jump the planking in this particular case? A. Yes.

“Q. How high is this planking or was this planking in inches or feet?

“A. Oh, I would say between an inch and a half or two inches at the most.

“Q. An inch and a half or two inches in height?

“A. Yes.

“Q. How wide was it, if you could tell us?

“A. It might have been a foot.

“Q. A foot wide? A. Yes.

“Q. And you say now that you went to the right of the bridge to avoid striking or hitting any person on the left side who happened to be there at the time? [66] A. That is right.

“Q. Now you testified today that you noticed three people on the bridge, is that right?

(Deposition of Paul W. Brander.)

"A. That was the group involved, yes.

"Q. The group involved? A. Yes.

"Q. But there were other people, is that it?

"A. Yes, there were others coming across.

"Q. How many others, about?

"A. I believe there were about four others.

"Q. About four others? A. Yes.

"Q. And that was a separate group, is that right? A. That is correct.

"Q. At the time of the inquest in answer to the very same question you said that you saw a group of five people across the bridge; would that refresh your recollection any? A. No.

"Q. You still maintain now that this group contained three people? A. At this date, yes.

"Q. On the night in question, July 12, 1945?

"A. Yes.

"Q. Would you say that the testimony you gave on [67] July 14, 1945, the day after or two days after the accident that you had seen five people in a group—would you say that that was not correct?

"A. No.

"Q. And is there a possibility that there were five people in that group? A. Yes.

"Q. And when for the first time did you see this group, and where were they in relation to the bridge?

"A. They were coming across on the lefthand side of the bridge.

"Q. Were they coming towards you or walking away from you?

(Deposition of Paul W. Brander.)

“A. They were coming towards me.

“Q. Towards you? A. Yes.

“Q. You were driving from Klamath towards the Shaker camp, is that right?

“A. That is correct.

“Q. Now, were they in the middle of the bridge, at the other end, or closer to your end as you went to the bridge?

“A. They were at the other end of the bridge.

“Q. The far end? [68]

“A. Yes, the end opposite.

“Q. Could you give us approximately how far they were from the end, the far end of the bridge?

“A. When I entered the bridge?

“Q. Yes.

“A. They were on the bridge but I don't remember exactly how far on the bridge they were.

“Q. Well, what would be your estimate today, Mr. Brander, in feet, if you can give it to us approximately? A. I would say about 10.

“Q. 10 feet? A. Yes.

“Q. 10 feet from where, can you tell us?

“A. From the beginning of the bridge at their end.

“Q. At the other end?

“A. That is right.

“Q. You would not say they were about the middle of the bridge, would you? A. No.

“Q. You heard the testimony of the witnesses at the inquest, did you not? A. Yes.

“Q. Do you recall the testimony approximately as to the position of this group at the time? [69]

(Deposition of Paul W. Brander.)

“A. I do not recall it now.

“Q. Can you say whether or not it was generally testified then that it was about the middle of the bridge, if you remember?

“Mr. Skolnik: If you remember.

“A. No, I don't remember what the testimony was here. It is so long ago.

“Q. Well, now, Mr. Brander, when and where were you with the truck on the bridge when you passed this group?

“A. I would say I was at about the center of the bridge at that time.

“Q. About the center of the bridge?

“A. Yes.

“Q. When you passed the group, is that it?

“A. Yes.

“Q. In other words, they were about 10 feet away from the far end of the bridge when you first saw them, right?

“Mr. Skolnik: You said when he entered the bridge.

“A. When I entered the bridge.

“Q. Yes, when you first saw the bridge, right?

“A. Yes.

“Q. And you passed about the middle of the bridge? A. Yes. [70]

“Q. Now you say you had the bright lights on at the time, is that right? A. Yes.

“Q. Did you turn the bright lights off at any time while you were going across the bridge?

(Deposition of Paul W. Brander.)

“A. No, because it was necessary to have them on to see where I was going.

“Q. You had them on at all times, is that right?

“A. Yes.

“Q. When you entered the bridge how fast were you going? A. About seven miles an hour.

“Q. When you passed the group in question how fast were you going?

“A. I would say about six.

“Q. About six?

“A. Yes; I slowed down slightly.

“Q. Did you at any time stop your vehicle on the bridge? A. No.

“Q. Just kept right on going, is that right?

“A. Yes.

“Q. Now could you tell us how far it is approximately from the camp to Klamath, California, in miles? Can you tell the distance? [71]

“A. Where our radar station was based, into town, you mean?

“Q. Yes.

“A. It was about a mile and a half or two miles, or maybe three.

“Mr. Skolnik: This distance you are giving now is from your camp to Klamath, is that what you mean?

“The Witness: Yes.

“Q. Now can you tell us what you did between 9 p.m. and 10 p.m. or 10:30 p.m. when this accident happened?

“A. I walked around the town and stopped in

(Deposition of Paul W. Brander.)

and had a drink, and it was while having a drink that Sergeant Warneck came up to me.

“Q. Where did you have the drink?

“A. At one of the bars in town.

“Q. Was it at the White Spot, or something like that?

“A. I think it was called the Bright Spot.”

Mr. Skolnik asks:

“Was it a bar or a restaurant?

“The Witness: It was a bar.

“Q. Sergeant Warneck came up to you at the bar or at this bar and grill? A. Yes.

“Q. The two women that were later in your car, in your carry-all, did you meet them at the bar?

“A. No.

“Q. Now, will you describe as best you can, Mr. Brander, where the two ladies sat in the carry-all when you gave them a lift to take them to the Shaker meeting?

“A. Sergeant Warneck sat next to me when we started out.

“Q. Next to the driver's seat, is that right?

“A. That is right. I believe he opened the door and he moved back into a back seat and one of the women set next to me, I believe, and the other one sat behind her.

“Q. The four of you were not crowded in the front cab or were not crowded in the seat next to you, or the driver's seat?

“A. No. There was a small folding seat next to the driver's.

(Deposition of Paul W. Brander.)

“Q. Now, what was the number of vehicles that were available at the camp on the day in question, July 12, 1945?

“A. There was a jeep, a carryall and a 2½-ton truck.

“Q. 2½-ton truck? A. Yes.

“Q. And what made up the personnel of the camp, [73] Mr. Brander? How many men?

“A. I would say approximately 20 men.

“Q. 20 men? A. Yes.

“Q. Did that include the officers and anyone else? A. The whole camp complement.

“Q. And you say the procedure or the custom followed was that anyone who could drive would take either the truck or carryall, or whatever was available to go into town, is that right?

“A. That is correct.

“Q. Now, had this been established by the supervising officer or the officer in charge of the camp that that procedure should be followed?

“A. No.

“Q. It had not? A. No.

“Q. Could you tell us how it came about that the procedure that you described was followed?

“A. I beg your pardon, I am getting a little confused here now.”

Mr. Skolnik interrupts.

“Who started that procedure?”

The Court: Well, we will interrupt and take the noon recess till 1:30. [74]

(A recess was taken until 1:30 p.m.)

(Deposition of Paul W. Brander.)

Afternoon Session—1:30 P.M.

The Court: Proceed. You may proceed.

Mr. Harrington: I believe there are a couple of questions that lead to the course of questioning that's being followed at this point, if I may repeat them for clarity.

The Court: All right.

Mr. Harrington (Reading):

"Q. And you say the procedure or the custom followed was that anyone who could drive would take either the truck or carryall, or whatever was available to go into town, is that right?

"A. That is correct.

"Q. Now, had this been established by the supervising officer or the officer in charge of the camp that that procedure should be followed?

"A. No.

"Q. It had not? A. No.

"Q. Could you tell us how it came about that the procedure that you described was followed?

"A. I beg your pardon, I am getting a little confused here now."

By Mr. Skolnik: [75]

"Who started that procedure?

"Q. How did it start?

"A. It was going on when I get up to the camp, and when it started I don't know.

"Q. It was going on when you got to the camp?

"A. That is right.

"Q. Did you ever hear of a dispatch or dispatch form, Mr. Brander? A. Yes.

(Deposition of Paul W. Brander.)

“Q. Was that dispatch form used at all at the camp?

“A. I don’t remember whether they used it at all. That is, I never signed one myself.

“Q. Did you have a dispatcher at the camp?

“A. No.

“Q. Could you tell us what is meant by a dispatch form? How was it used or what is it?

“A. I believe that is a form used to designate the driver and the vehicle at the time it leaves, and its destination.

“Q. And you say now that no dispatch forms were kept at the camp so far as you know?

“A. They might have been kept to check on the mileage, but I never saw any.

“Q. When you took a motor vehicle out whether on official business, or, as you say, after duty hours for leave purposes, did you have to mark your mileage? That is, mileage at leaving point and destination and returning point? A. No.

“Q. In other words, no record of any mileage was kept at the camp, is that it?

“A. There is a record kept of the mileage. How it was kept, I don’t know.

“Q. Well, how would a record be kept of them? I mean, how would there be a record in existence if someone did not report the mileage on the trucks or the particular vehicle?

“A. I believe the mileage was checked every day.

“Q. By whom?

(Deposition of Paul W. Brander.)

“A. By Sergeant Warneck. It was his duty to check the milage.

“Q. Was there a form of requisition used at the camp at any time so that a truck could be used or a motor vehicle could be taken out of camp for whatever purpose necessary?

“A. Not to my knowledge.

“Q. Not to your knowledge? A. No.

“Q. You never signed any requisition during the time you were in camp for any motor vehicle at any time? [77] A. No.

“Q. Was there any other means of conveyance from the camp to Klamath, California, or to any other nearby town especially, shall I say, public conveyance from the outside?

“A. Well, there was a Greyhound Bus Line that went through Klamath.

“Q. Went through Klamath? A. Yes.

“Q. But did this bus line go from Klamath to the camp? A. No.

“Q. I mean was there any means of transportation other than your own Army trucks or carry-all to get the men from the radar station to any nearby town? A. No.

“Q. Now, during the month of July, 1945, and up to and including July 12, Mr. Brander, how many times had you take a motor vehicle from the station, radar station, to Klamath or any other nearby town?

“A. From what date to what date?

“Q. From July 1st, the first 12 days in July.

(Deposition of Paul W. Brander.)

“A. I am afraid I don’t know.

“Q. Is that your answer? A. Yes.

“Q. Can you approximate in any way? Had you taken it [78] out before that July 12th date?

“A. Yes.

“Q. You had? A. Yes.

“Q. How soon before then, more or less?

“A. I believe I drove the 21½-ton truck into town that afternoon to pick up rations.

“Q. To pick up rations? A. Yes.

“Q. How many other times had you picked up rations, if you can tell us, in that month?

“A. It might have been about three times before that at most.

“Q. Had you driven the truck down to Klamath on any other evening prior to July 12th?

“A. Yes.

“Q. And approximately how many times you can’t tell, is that it? A. I can’t tell.

“Q. Had you driven any truck down during the month of June, 1945, the prior month?

“A. Yes.

“Q. How often would you say you had driven the trucks during that month?

“A. I can’t even estimate that. [79]

“Q. Would it be more than once a week?

“A. Yes.

“Q. It would? A. Yes.

“Q. Well now, how many men at the station that you know of could drive automobiles, motor vehicles?

(Deposition of Paul W. Brander.)

“A. I believe the majority could.

“Q. Well, will you tell us then how or what the custom of the camp was with respect to obtaining a car to go down to any town? How would you control the number of men or which man was going to take a car or a truck or any motor vehicle?

“The Witness: Please state that again.”

There was a discussion off the record, and there was a request that the question be read. The question was read.

“A. Well, whoever got through and was ready to go to town got out to the truck first and sat there until the others came along, and he drove into town.

“Q. Well, ordinarily would most of the men who would go into town go at one time in the same truck? A. Yes.

“Q. On the night in question, July 12, 1945, you say you drove four men into town?

“A. I believe I drove four men, yes.

“Q. Are the four the only men that went to town on [80] that particular night, as far as you know? A. No.

“Q. How would the others have gotten to town?

“A. Through use of private cars owned by some of the men at camp.

“Q. Had this carryall been in town prior to nine o'clock in the evening when you used it?

“A. No.

“Q. It had not? A. It had not.

“Q. What is the highest number of men that

(Deposition of Paul W. Brander.)

you carried on either the carryall or one of the other motor vehicles from the camp to the town?

“A. About six or seven at the most.

“Q. Six or seven? A. Yes.

“Q. And what arrangements were made for you men to go back to camp after the evening was over? Would you meet at one particular place, or how would you go about it?

“A. Well, we would meet where the carryall was parked until everybody got there, and everybody went back together unless they had other means of getting back or they were not going on duty that night.

“Q. Could you tell us the distance from the barracks [81] or the personnel quarters to the outside of this camp, Mr. Brander, approximately?

“A. That is kind of a hard question if you didn't know how the camp was laid out. Let me ask a question here: What do you consider the outside of the camp?

“Q. Well, the confines, whatever constitutes the actual outskirts of the camp, whether they had a fence there or not.”

By Mr. Skolnik:

“Do you mean the entrance to leave the camp?

“Mr. Crimi: Yes, to the entrance.

“Mr. Skolnik: Going to Klamath?

“A. Well, you would have to be there to understand what a peculiar situation it was. I am trying to figure it out. The camp area was set aside quite some distance away from the radar

(Deposition of Paul W. Brander.)

station itself, and what area of land the Government had leased, I don't know.

“Q. Was there a nearby road to this camp or across the camp or any other direction?

“A. There was a small dirt road that just passed the camp.

“Q. That just passed the camp?

“A. Yes. [82]

“Q. It went through the camp, did it?

“A. No.

“Q. And how far would that be from your barracks or headquarters to that dirt road?

“A. Oh, about 300, 400 feet.

“Q. Three or four hundred feet? A. Yes.

“Q. And Klamath was the nearest town to the camp? A. Yes.

“Q. Now, did part of the personnel of the camp go to town after six every night, or would there be certain specific nights during the week that was allowed?

“A. It was just the evenings that they were free from duty.

“Q. Would that happen every night with a group from the camp, be free from duty every night so that a car or one of the motor vehicles would go to camp every night? A. Yes.

“Q. And that would be after your tour of duty which terminated at what time? Was there any time fixed?

“A. Well, we ran crews of two on shifts of

(Deposition of Paul W. Brander.)

about eight hours, I believe, at a stretch, and then one crew came off about six in the evening.

“Q. About six in the evening? [83]

“A. Yes.

“Q. Now will you tell us, Mr. Brander, whether or not disciplinary proceedings were brought against you after July 12, 1945, by reason of this accident? A. Yes.

“Q. They were? A. Yes.

“Q. What was the nature of the charges brought against you? A. Misconduct.

“Q. Could you explain what was meant by misconduct? A. I don't know.

“Q. What was the result of the proceedings against you, if any?

“A. Reduction in grade.

“Q. Reduction in grade? A. Yes.

“Q. At the time of the accident, July 12, 1945, you were, I believe you testified, a staff sergeant?

“A. Yes, sir.

“Q. And when you were reduced in grade what was your reduction to? A. I was a private.

“Q. Was this reduction caused because of something you failed to do or did not do at the time of this [84] accident or the night in question?

“A. I don't know.

“Q. Weren't the charges explained to you at the time that the proceedings were brought against you? A. No.

“Q. Who brought the charges against you?

“A. I don't know who brought the charges

(Deposition of Paul W. Brander.)

against me. All I know is that a special bulletin came out which stated I am reduced to a grade of private for misconduct.

“Q. Who signed the special bulletin?

“A. I believe the commanding officer of the 411 Army Air Force Base Unit signed it.

“Q. And who was the commanding officer on July 12, 1945?

“A. Lieutenant Colonel Everett.

“Q. Weren't you reduced in rank, Mr. Brander, because you had failed to obtain permission for this vehicle that you were driving on the night in question, July 12, 1945? A. I don't know.

“Q. Could it have been for that reason?

“A. It might have.

“Q. Was a hearing given you with respect to these charges brought against you? [85]

“A. No.

“Q. So that the only thing that you know is that you read the bulletin and it informed you that you had been reduced in rank, is that correct? A. That is correct.

“Q. Can you tell us what infraction of the rules, if any, you might have been guilty of, if you were?

“A. It might have been the unauthorized use of the vehicle.

“Mr. Skolnik: What was that?”

His attorney says:

“Unauthorized use.

“Q. Well, when you say ‘unauthorized use’ was

(Deposition of Paul W. Brander.)

there a procedure that you had to follow before taking a motor vehicle out of the camp?

"A. Not to my knowledge.

"Q. Not to your knowledge? A. No.

"Q. Do you know if other members of the camp obtained permission whether in the form of a dispatch or requisition before they took a car or a motor vehicle outside of the camp?

"A. No. I believe they did not.

"Q. They did not, is that right?

"A. No. [86]

"Q. But you cannot now tell us whether one was required, as far as you know?

"A. I can't tell you whether it was required or not, no.

"Q. When were you discharged from the Army, Mr. Brander, honorably discharged or otherwise?

"A. On October 24, 1945.

"Q. Do you remember the number of the carry-all that was involved in this accident?

"A. No, I don't.

"Mr. Crimi: I think that is all."

Mr. Skolnik said:

"I have just this one question.

"Redirect Examination

"By Mr. Skolnik:

"Q. Mr. Brander, did you drive an Army vehicle into the town of Klamath on the day of the accident but prior to that particular evening?

"A. Yes.

(Deposition of Paul W. Brander.)

“Q. What was the purpose of that trip?

“A. To pick up rations.

“Q. When you drove into town to pick up rations were you at that time designated by someone to do so, or did you do so voluntarily?

“A. I believe it was voluntarily.

“Q. In other words, you were not acting under any [87] particular orders at that time, is that right? Is that correct, or am I wrong?

“A. No, you are correct. I believe I did it because Sergeant Warneck wanted to go to town in the afternoon and I dropped him off. He generally drove in to pick up rations.

“Q. Were you on any particular duty during that particular afternoon? A. No.

“Q. Were you off duty all that afternoon?

“A. I was free that afternoon.

“Q. Did you drive to Klamath on prior occasions to pick up rations?

“A. Yes, several times.

“Q. And at those other times did you also drive voluntarily or were you designated by someone at the camp to do so?

“A. I believe the lieutenant designated me one day to drive in for the rations.

“Q. You say on one day? A. Yes.

“Q. How about other times?

“A. I volunteered for the job to relieve Sergeant Warneck if he had something else pending.

“Q. In other words, was the matter of going to town [88] to pick up rations a matter of volun-

(Deposition of Paul W. Brander.)

teering to do so, or was that done in the regular manner and routine and by special designation of a superior officer?

“The Witness: Would you care to elaborate on that ‘regular manner’?”

There was an off-the-record discussion.

“A. It was voluntary on my part. However, I remember being told to pick up the rations by the lieutenant on one occasion.

“Q. Now coming down to the evening of July 12, 1945, when you drove the Army vehicle to Klamath, were you designated by someone to do so or did you do so voluntarily?

“A. I did so voluntarily.

“Q. Did the lieutenants at the camp or any other officer ever designate anyone in particular to drive the Army vehicles to Klamath on any particular evening?

“A. Prior to the accident I do not recall any such orders being given.

“Q. Can you tell me approximately how far was this barn where the **Shaker ceremony** was taking place in relation to the town of Klamath? By the way, is it a city or a town? [89]

“A. A town. It was on the outskirts. I would say it was approximately about three city blocks from the center of the town.

“Q. You say three city blocks: will you give me an idea of the type of blocks you have in mind?

“A. New York City blocks.

“Q. Well, we have short blocks and long ones.

(Deposition of Paul W. Brander.)

Are you familiar with 42nd Street and Fifth Avenue? A. Yes.

“Q. Are you referring to the short blocks each of which is about 200 or 215 feet long?

“A. That is correct.

“Q. Will you say this barn was in the center of the town of Klamath or outside of the town of Klamath?

“A. Actually I believe it comprised part of the town but it was on the fringe of the town.

“Mr. Skolnik: No further questions.

“Recross-Examination

“By Mr. Crimi:

“Q. Just one question: you say that some orders were given after the accident with respect to the handling or taking out of trucks?

“A. Yes.

“Q. Will you tell us what those orders were?

“A. I believe that certain men were specified to drive the trucks in on certain nights. [90]

“Q. I see. In other words, they designated a driver for the truck and the night that he was to drive? A. Yes.

“Q. Well, prior to that time your superior officer knew of the practice that any man would get to the truck first would drive the truck into town with the rest of the men, is that right? A. Yes.

“Q. That fact was known to the lieutenant in charge, was it? A. Yes.

“Q. It was known to Sergeant Warneck, your

(Deposition of Paul W. Brander.)

immediate superior or superior officer, is that right?

“A. Sergeant Warneck was not my superior.

“Q. He was not? A. No.

“Q. What would he be? Would have to take an order from him? A. No.

“Q. Well, it was known to Sergeant Warneck anyway? A. Yes.

“Q. Who was your immediate superior?

“A. Well, it was a tech sergeant whose name I don't remember and the lieutenant, the commander of the station. [91]

“Q. Lieutenant Simon, is that right?

“A. Yes.

“Q. And the tech sergeant also knew of the custom? A. Yes.

“Mr. Crimi: That is all.

“Mr. Skolnik: Just a few more questions.

“Redirect Examination

“By Mr. Skolnik:

“Q. When you say you were permitted to take an Army vehicle from the camp to the town of Klamath, was that permission only for the purpose of transporting fellow soldiers to Klamath? Is that correct? A. Yes.

“Q. Did such permission also include the use of that vehicle to any places outside of Klamath or for any other purpose than transportation to and from the camp?

“A. Yes. We used the vehicle to go short distances outside of Klamath.

“Q. To the knowledge of your superior officers?

[(Deposition of Paul W. Brander.)

“A. Yes.

“Q. And for what purpose were these trips made outside of Klamath?

“A. An invitation to dinner, for one.

“Q. And when you or any other member of your camp took such trip, was that with the knowledge of the [92] commanding officer at the camp?

“A. Yes.

“Q. And if the commanding officer had no such knowledge of such trip outside of Klamath, was it permitted?

“A. As far as I know, yes.

“Q. Even though the officer had no knowledge of any such use of the car, was it permitted?

“A. It was never denied us.

“Q. Well, when you it was never denied you, was it always done with consent and knowledge on the part of a superior officer? A. No.

“Q. How do you know whether or not it was never denied to you?

“A. Because on no occasion did the lieutenant forbid the use of a vehicle for any trip slightly outside of Klamath; that is, having knowledge of a trip previously made.

“Q. Is it not a fact that as a general rule anyone seeking to use an Army vehicle to go to some point beyond the town of Klamath would ask the superior officer for such permission?

“A. Well, if the point outside of Klamath involved a considerable distance. [93]

“Mr. Skolnik: No further questions.

(Deposition of Paul W. Brander.)

“Recross-Examination

“By Mr. Crimi:

“Q. What is the distance from the bar where you had stopped to the Shaker meeting?

“A. About three city blocks previously mentioned.

“Q. Was the Shaker meeting in the town of Klamath or outside?

“A. It was in the town of Klamath.

“Q. In other words, you would not have needed any special permission to drive the truck from the point at the bar to the place where the Shaker meeting was being held? A. No.

“Mr. Crimi: That is all.

“Discussion off the record,” and it was stipulated by and between the attorneys for the parties that all objections except as to the form of any questions put were reserved for the trial.

Follows, on my copy, the signature of Paul Brander.

[Endorsed]: Filed Feb. 15, 1949. [94]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, (or true and correct copies of orders entered on the minutes of this Court) in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties:

Amended complaint.

Answer to complaint.

Opinion and order.

Minutes of Court—August 3, 1948.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Statement of points upon which plaintiffs will rely on appeal.

Plaintiff's designation of record on appeal.

Defendant's designation of record on appeal.

Stipulation and order extending time in which to file and docket record on appeal.

Exhibit No. 1.

Reporter's transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 16th day of February, A.D. 1949.

[Seal]

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12188. United States Court of Appeals for the Ninth Circuit. Marion J. Murphey, Elizabeth Irene Swartz, Marjorie Josephine Preskey and Robert Marion Murphey, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed February 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12188

MARION J. MURPHEY, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO RELY IN THIS
APPEAL AND APPELLANTS' DESIGNA-
TION OF RECORD ON APPEAL

I.

Appellants state that they will rely on the fol-
lowing points in taking this appeal:

1. That in deciding whether one Sergeant

Brander had permission or authority, express or implied, to operate a certain government motor vehicle at the time an accident occurred, the Trial Court erred in adopting naked opinion and naked conclusion testimony given by deposition as against detailed factual testimony on the same issue, also given by deposition.

2. That there is no substantial evidence in the record to support findings numbered 2, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Trial Court.

3. That the Trial Court exceeded the proper bounds of its discretion in requiring Plaintiffs-Appellants to permit the Trial Court to receive inadmissible and prejudicial evidence, afterward adopted by the Trial Court as the exact basis of its opinion, or be faced with an extended continuance of the trial of the cause.

4. That on the admissible evidence and on the weight of the credible evidence given by deposition the Trial Court erred in finding that Paul W. Brander had no authority to operate a certain motor vehicle at the time of an accident.

5. That on all the credible and admissible evidence the Trial Court erred in finding that Paul W. Brander was not acting in line of duty at the time of a certain accident.

6. That on all the evidence the Trial Court erred in not finding its verdict in favor of plaintiffs.

II.

Appellants hereby designate as the Record on Appeal herein the following:

1. That part of the reporter's transcript of the proceedings at the trial which includes the reading into the record of the depositions of Paul W. Brander and Richard F. Simon. No testimony of the witnesses Marion J. Murphey, Elizabeth M. Swartz or Harry Swartz is to be included.

2. The complaint as amended; the answer; the opinion of the Court; the findings and conclusions including the order directing entry of judgment; the judgment; the notice of appeal; and this statement of points and designation of the record on appeal; clerk's certificate.

By their attorney,

/s/ FRANCIS E. HARRINGTON,
Of Counsel for Appellants.

[Endorsed]: Filed February 28, 1949. Paul P. O'Brien, Clerk.

